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FILED

No. 848

In the

Supreme Court of the United States

October Term, 1944

DEWEY BOB [illegible], JESSE PLATT, CARL M. FOX,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals
for the Sixth Circuit.

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No.

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DEWEY BOB HELM, BERT FLATT, CARL M. FOX,
Petitioners.

v.

UNITED STATES OF AMERICA
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Petition For a Writ of Certiorari to The United States Court of Appeals For The Sixth Circuit

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CITATIONS

Cases:

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on February 25, 1961.

CITATIONS TO OPINIONS BELOW

There was no formal opinion by the District Court on the issues presented, reported or otherwise. The rulings of the District Court, and orders pursuant thereto, are printed in Appendix B hereto, infra, p. 13. The opinion of the Court of Appeals, also unreported, is printed in Appendix B hereto, infra, p. 15.

JURISDICTION

The judgment of the Court of Appeals was entered February 25, 1961, (Appendix B, infra, p. 15). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether one may be convicted under an indictment which charges no offense under existing law, but which indictment is drawn and charges an offense only under a repealed statute.

2. Whether one may be convicted of unlawfully possessing, or conspiring to possess, distilled spirits "required to be stamped under the provisions of Section 5205(a)(2) of Title 26, U.S.C.", when the spirits in the evidence were spirits not required to be stamped under the provisions of Section 5205(a)(2) of Title 26, U.S.C., and for which stamps could not under the law be obtained.

STATUTES INVOLVED

The statutory provisions involved are 53 Stat. 303, former 26 U.S.C. 2803(a); 72 Stat. 1358, 26 U.S.C. 5205(a)(2), (3); 72 Stat. 1401, 26 U.S.C. 5604(a)(1), (15); and 62 Stat. 701, 18 U.S.C. 371. They are printed in Appendix A, infra, p. 11. The regulations involved are 26 CFR 230.18, 20, 24, 35, 220, which are printed in Appendix A, p. 12.

STATEMENT

On September 2, 1959, indictments were returned against petitioners charging them with possession, during the months of July and August, 1959, distilled spirits "the immediate containers thereof not having affixed thereto in the manner required by law, stamps evidencing payment of all internal revenue taxes imposed on such spirits" (R., pp. 3a, 33a), the indictments being in the language of former Section 2803 (a) of Title 26, U.S.C., (Appendix A, infra, p. 11) which Section had been repealed in 1954, five years prior to the date of the offenses alleged. At the time of the alleged offense there was no statute requiring the containers of any distilled spirits to have stamps evidencing payment of internal revenue taxes imposed on such spirits.

Also on September 2, 1959, petitioners were charged with conspiring to violate Section 5604(a)(1) of Title 26, U.S.C., (Appendix A, infra, p. 11) which provides the penalty for "any person who shall transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of Section 5205 (a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section." At the time of the alleged offense the only requirement for stamps relating to containers of distilled spirits was that established under Section 5205 of Title 26, U.S.C., and the regulations promulgated pursuant thereto, 26 CFR 230.18, 24; 220, 222, 225, 226 (Appendix, infra, p. 12), which provided for stamps on containers of spirits produced in licensed and regulated distilleries, which stamps showed not that the tax had been paid, but only

that it had been determined. It was not necessary that the tax had been paid. Neither Section 5205 of Title 26, U.S.C., nor the regulations, established any requirement or made any provision for stamps for spirits produced in unlicensed or unregulated distilleries, and all the spirits about which there was any proof were of this type. (R., p. 44a).

Following the introduction of the proof, which established that the only spirits involved were those produced in an unlicensed and unregulated distillery (R., p. 44a), petitioners moved for verdicts of acquittal (R., p. 43a), which motion the District Court overruled. (Appendix A, infra, p. 13), without opinion. The effect of this ruling was to hold that the indictments charged offenses under existing law, that the offenses charged were the offenses proven, and that the conviction, under the proof adduced, did not deprive petitioners of their liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

The cases were submitted to the jury, verdicts of guilty were returned as to each count of each indictment. (R., pp. 6a, 23a, 36a). Petitioner Helm received sentences of three years under each count of each indictment under which he was charged, these sentences to run currently, (R., pp. 23a, 36a). Petitioner Flatt received concurrent sentences of two years (R., pp. 6a, 23a), and Petitioner Fox received concurrent sentences of fifteen months (R., pp. 6a, 23a).

The Court below affirmed the judgments of the District Court on the authority of *Smith* vs. *U. S.*, 241 F 2nd 267, C. A. 5, 1957, (Appendix B, infra, p. 23)

holding that the indictment charged offenses under existing statutes. The other issues raised by petitioners were dismissed without discussion or citation of authority by the Court below in its memorandum opinion which was not for publication. (Appendix B, infra, p. 13).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case and of the Court of Appeals for the Fifth Circuit in *Smith* vs. *U.S.*, 241 F 2nd 267, (Appendix C, infra, p. 23), upon the authority of which the instant case was decided, are directly in conflict with the decision of the Court of Appeals for the Third Circuit in *U. S.* vs. *Smith*, 232 F 2nd 570, C. A. 3, (Appendix C, infra, p. 17) wherein it was held that one may not be convicted under an indictment drawn under a repealed statute, that an indictment so drawn does not charge an offense under existing law, and that 26 USC 5205(a)(2) and 26 U.S.C. 5604(a)(1) relate to requirements for stamps and do not constitute a simple prohibition against possession of untaxpaid whiskey. It should be noted that the Fifth Circuit decision followed by the Court below was not unanimous, Judge Borah dissenting and agreeing with the unanimous decision of the Court in the Third Circuit case.

2. Clearly the questions are important, for the reason that the holding of the Fifth Circuit, now followed by the Sixth, strips defendants in these circuits of one of the oldest and most sacred protections of individual rights, liberty, and freedom known to our system of government, namely that one shall not be required to answer to the sovereign, or suffer conviction, for any

offense other than the one specifically charged in the indictment. Although under the law in effect at the time of the indictment stamps evidencing payment of internal revenue taxes were not required under any statute, the Fifth Circuit, and now the Sixth, have sustained convictions under indictments that charge only the possession of spirits which fail to have stamps showing internal revenue taxes to have been paid, and of conspiring unlawfully to possess spirits required to be stamped, where the proof showed the spirits to be of the kind for which no kind of stamps are required or provided, and for which no kind of stamps could be obtained. 72 Stat. 1401, 26 U.S.C. 5604(a)(15). (Appendix, infra, p. 11).

The specific rationale of these holdings, as stated in *Smith* vs. *U. S.*, 241 F 2nd 267, (Appendix C, infra, p. 23) is (1) that regardless of the fact that the indictments relate only to failure to have a required stamp, the statutes involved, and its predecessors, are the ones the government has customarily used for the prosecution of possessors of untaxpaid whiskey, and therefore the convictions should stand. Further, (2), that no prejudice has resulted, because if the defendant had been properly indicted under some other statute, they would have been unable to make out a defense.

The general rationale seems to have been, both in the Fifth Circuit Smith case, and in the instant cases when before the Sixth Circuit, that these were just some more "moonshiner" cases, that any direct association with moonshine whiskey is illegal, and that therefore the issues raised by defendants were academic and of no importance. Defendants respectfully

submit to this Court that the nature of the offense does not determine the importance of an issue of this kind, and that nothing could be of more importance to the rights and liberties of all citizens than a review to correct a decision which allows the sovereign to convict under an indictment which charges no offense under existing law, to convict under proof of some offense other than the one charged under the indictment, and which in effect places the burden on one charged with one offense with proving he is guilty of no offense.

Should these convictions be allowed to stand, then the government can, against any citizen, choose, to suit its own convenience, an indictment under any statute generally related to the alleged dereliction, and sustain a conviction if its proof shows defendant to be guilty of some offense generally related to the subject of the indictment.

To say, as the Fifth Circuit did, that there has been no prejudice because even if the indictment had been correctly drawn and had charged an offense defendants would not have been able to make out their defense, is the same as saying that one is not prejudiced by the use of evidence obtained from his home without a search warrant, because had a warrant been obtained the same evidence would have been found and could have been used.

3. The decision of the Court below is believed to be erroneous, and the conflicting opinion of the Third Circuit Court of Appeals in *U. S.* vs. *Smith*, 232 F 2nd 570, (Appendix C, infra, p. 17) is believed to be correct. For the decision of the Court below to have any validity, 26 U.S.C. 5205 (a) (2) and 26 U.S.C. 5604 (a) (1) must be construed not as prohibitions against

possessing unstamped whiskey which is required by statute to be stamped, but simply as prohibitions against possession of whiskey on which the tax has not been paid. This is contrary to the plain wording of the statutes, and regulations promulgated thereunder, which establish a requirement for and the means of obtaining certain stamps, applicable only to spirits not of the kind shown in the evidence, and without reference to whether or not any tax has been paid.

It would further be contrary to decisions of this Court which hold that all criminal statutes must be strictly construed, and favorably to the defendants. *U. S.* vs. *Resnick*, 299 U. S. 207. In the Fifth Circuit case followed by the Court below, the contrary rule was followed, the Court actually and concededly putting a construction on the statutes not in any way called for by their words, and completely unfavorable to defendants, simply because the government had customarily employed the statutes in a way consistent with such a construction. *Smith* vs. *U. S.*, 241 F 2nd 267, 269. (Appendix C, infra, p. 23).

It is also erroneous in that it permits the conviction of an offense not charged in the indictment, where it might appear from the evidence that defendants may have been guilty of some other offense for which they might possibly have been indicted, and to which possible indictment it doesn't affirmatively appear that they could make a good defense. *Smith* vs. *U. S.*, 241 F 2nd 267, 270 (Appendix C, infra, pp. 26, 27). This decision is thereby in direct conflict with the Third Circuit case of *U. S.* vs. *Smith*, 232 F 2nd, 570, (Appendix C, infra, p. 17) which holds that one may only be convicted of the specific charge laid in the indictment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

APPENDIX A

53 Stat. 303, former 26 U.S.C. 2803 (a). No person shall transports, possess, buy, sell or transfer any distilled spirits unless the immediate container has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits.

72 Stat. 1358, 26 U.S.C. 5205 (a) (2) (3).

(a) (2) No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter.

(3) The Secretary or his delegate shall prescribe regulations with respect to the supplying or procuring of stamps required under this subsection or section 5235, the time and manner of applying for, issuing, affixing, and destroying such stamps, the form of such stamps and the information to be shown thereon, applications for the stamps, proof that applicants are entitled to such stamps, and the method of accounting for such stamps, and such other regulations as he may deem necessary for the enforcement of this subsection.

72 Stat. 1401, 26 U.S.C. 5604 (a) (1), (15).

(a) General.—Any person who shall—

(1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205 (a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section; or

* * * * * *

(15) possess any stamp prescribed under section 5205 or section 5235 obtained by him otherwise than as provided by such sections or regulations issued pursuant thereto; * * * * shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both, for each such offense.

26 CFR 230.18 PROPRIETOR. "Proprietor" shall mean the operator of a taxpaid bottling house, except where otherwise indicated.

26 CFR 230.20 RED STRIP STAMPS. "Red Strip stamps" shall mean the stamps prescribed under authority of section 5008 (b), I.R.C.

26 CFR 230.24 TAXPAID BOTTLING HOUSE. "Taxpaid bottling house" or bottling house" shall mean a taxpaid bottling house established or operated under this part for the bottling of taxpaid spirits, including wines, cordials, liqueurs, etc.

26 CFR 230.35 WHO MAY ESTABLISH. Taxpaid bottling houses may be established for the bottling of taxpaid spirits by the proprietor of a distillery, or an internal revenue bonded warehouse, industrial alcohol plant, or industrial alcohol bonded warehouse, or by an agency of any State or political subdivision thereof.

26 CFR 230.220 REQUISITION, Form 428. Proprietors of taxpaid bottling houses may procure red strip stamps in anticipation of their current needs. Requisition for red strip stamps will be made by proprietors on Form 428, in triplicate.

APPENDIX B

ORDER OVERRULING MOTION FOR VERDICT OF ACQUITTAL

In The

DISTRICT COURT OF THE UNITED STATES
For the Middle District of Tennessee,

Northeastern Division

May 20, 1960

UNITED STATES OF AMERICA vs. BERT FLATT and CARL M. FOX	No. 3015 N. E. D. Criminal
UNITED STATES OF AMERICA vs. DEWEY BOB HELM, BERT FLATT, CARL M. FOX and HAROLD SAMPSON HUFF	No. 3016 N. E. D. Criminal
UNITED STATES OF AMERICA vs. DEWEY BOB HELM	No. 3019 N. E. D. Criminal

ORDER OVERRULING MOTION FOR VERDICT OF ACQUITTAL

Came again the United States Attorney and also came the defendants Bert Flatt, Carl M. Fox, Dewey Bob Helm and Harold Sampson Huff in their own proper persons and by their attorneys, the defendant Huff having waived the right to be represented by

counsel offered by the Court; and came again also the jury, who on yesterday were respited until today, and the taking of testimony in the case was resumed.

At the conclusion of all proof in the cases, the defendants, and each of them, renewed their motions for a judgment of acquittal, and after argument of counsel, the Court reserved its ruling on said motions pending the verdict of the jury.

After the return of the verdicts of the jury, and upon further consideration,

It is ORDERED by the Court that said motions be, and the same are overruled.

Enter:

United States District Judge.

Approved for Entry:

United States Attorney

Nos. 14309, 14310, 14311.

UNITED STATES COURT OF APPEALS

Bert Flatt and Carl M. Fox,
Appellants,
v.
United States of America,
Appellee.

Dewey Bob Helm, Bert Flatt,
and Carl M. Fox,
Appellants,
v.
United States of America,
Appellee.

Dewey Bob Helm,
Appellant,
v.
United States of America,
Appellee.

ORDER

Before: CECIL, WEICK and O'SULLIVAN, Circuit Judges.

These appeals from the United States District Court, for the Middle District of Tennessee, Northeastern Division, involve questions of the sufficiency of the indictments.

It is claimed by counsel for the appellants that the indictments purportedly charge offenses under sections 5205 (a) (2), 5604 (a) (1), of Title 26, U.S.C., whereas in fact they use the language of section 2803 (a) of

Title 26, U.S.C., now repealed; and that as a result thereof the indictments do not charge the appellants with the commission of any crime.

Upon consideration of the briefs and oral arguments of counsel and the record on appeal, we conclude that the indictments are sufficient and that the appellants are charged with the crimes as indicated by the code sections in the indictments. The validity and sufficiency of the indictments will be sustained on authority of *Smith* v. *United States*, 241 F. 2d 267, C.A. 5.

Other questions argued on the appeals were considered and found to be without merit.

It is therefore ordered, adjudged and decreed that the judgment of the District Court in each case be and it is hereby affirmed.

LESTER L. CECIL,
Circuit Judge.

APPENDIX C

UNITED STATES OF AMERICA

v.

JAMES H. SMITH, SR., Appellant.

No. 11741.

United States Court of Appeals

Third Circuit

Argued March 22, 1956.

Decided April 27, 1956.

McLAUGHLIN, Circuit Judge.

In this appeal from a conviction of unlawful possession of untaxed liquor appellant attacks the indictment on the ground that the facts alleged therein do not make out a crime under the controlling statute.

The indictment charged in its first count:

> "That on or about January 25, 1955, at Philadelphia in the Eastern District of Pennsylvania, James H. Smith, Sr., did knowingly and unlawfully have in his possession, to wit: 36 1-gallon jugs of whiskey, upon which said containers or jugs was not affixed thereto the requisite stamps denoting the quantity of distilled spirits contained therein, and evidencing payment of all Internal Revenue taxes imposed by law on such spirits; in violation of Title 26 U.S.C. Section 5008 (b) (1)".

The second count alleged "transportation" by appellant of the same whiskey.

The district judge sitting without a jury found appellant guilty on Count I and sentenced him to imprisonment for a year and to pay a fine of $250. Judgment of Not Guilty was entered on Count II.

Section 5008 (b) (1) took effect on January 1, 1955; the repeal of its predecessor, 26 U.S.C. § 2803 (a), was effective on the same date. 26 U.S.C.A. § 7851 (a) (5). Although Count I purports to be founded on § 5008 (b) (1), it is actually a verbatim recitation of repealed Section 2803 (a). Thus, 26 U.S.C.A. § 2803 (a) provided in relevant part:

"No person shall * * * possess * * * any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits."

Section 5008 (b) (1) changed the law as it had existed in Section 2803 (a), it provided only that:

> "No person shall * * * possess * * * any distilled spirits, unless the immediate container thereof has affixed thereto in such manner as to be broken on opening the container, a stamp evidencing the tax or indicating compliance with the provisions of this chapter."

House Report No. 1337 points up the modification in the law as it had existed in Section 2803 (a).

"Subsection (b), 'Stamps for other containers of distilled spirits':

"Paragraph (1), 'Requirements,' is existing law (see sec. 2803 (a) except that, due to the method of payment by return, the stamp cannot in all instances be deemed evidence that tax had been paid. The stamp does, however, evidence that tax has been determined and that all applicable provisions of law relating to the bottling of spirits * * * have been complied with. Accordingly, the phrase 'evidencing payment of all internal revenue taxes imposed on such spirits' has been deleted and the phrase 'evidencing the tax or indicating compliance with the provisions of this chapter' has been substituted therefor.

"Two other changes in the existing law in paragraph (1) are the deletion of the provision that the stamps denote the quantity of distilled spirits and the insertion of the requirement that the stamp be affixed in such manner as to be destroyed when the container is opened." U. S. Code Cong. and Adm. News 1954, pp. 4474, 4475.

Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C., provides in part as follows:

"(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * * The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the de-

fendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

(1-3) "The true test of the sufficiency of an indictment is * * * whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre* v. *United States*, 157 U.S. 286, 290, 15 S.Ct. 628, 630, 39 L.Ed. 704; *Rosen* v. *United States*, 161 U.S. 29, 34, 16 S.Ct. 434, 480, 40 L.Ed. 606." *Hagner* v. *United States*, 1932, 285 U.S. 427, 431, 52 S.Ct. 417, 419, 76 L.Ed. 861. An indictment should "leave no doubt in the minds of the accused and the court of the exact offense intended to be charged." *Evans* v. *United States*, 1893, 153 U.S. 584, 587, 14 S.Ct. 934, 936, 38 L.Ed. 830. "While nonessential detail in an otherwise good indictment does not invalidate it, where a grand jury indicts under one statute, a conviction may not be had under one statute, a conviction may not be had under another by the device of discarding essential averments as surplusage." *Bratton* v. *United States*, 10 Cir., 1934, 73 F. 2d 795, 797.

(4, 5) An indictment is required to set forth all the elements of the crime charged. This may be accomplished usually by following substantially the wording of the statute. *United States* v. *Debrow*, 1953, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92. And if the indict-

ment fails to state facts sufficient to constitute the alleged offense, the judgment of conviction cannot be sustained. *Sonnenberg* v. *United States*, 9 Cir., 1920, 264 F. 327. Rule 12(b) (2), F.R.Cr.P. 18 U.S.C.

An essential part of the present offense is the absence of the particular stamps, affixed in the specific manner described in Section 5008(b) (1). It is not just the lack of any stamps. Even showing that the requisite stamps were on the container is not a defense, unless it is also proved that they were affixed in the prescribed manner. Here, the grand jury indicted for the crime described by the voided statute, and apparently no one discovered the mistake until this appeal. Concededly the offense charged by Section 5008(b) (1) is substantially different than the one stated in the repealed law. The stamps no longer need denote the quantity and indicate the payment of the tax. They must however be affixed so as to be broken on opening and their purpose is to show merely the determination of the tax rather than its payment.

(6) We cannot agree with the contention that no prejudice to the defendant could result from the admitted situation. He was forced to defend against elements of an offense which are no longer proscribed. For conviction under the new statute additional elements must be proved which are not spelled out in the indictment. The defendant may have been guilty of something but the indictment was not adequate notice of the crime with which the government attempted to charge him.

It is also argued that the regulations require the stamps described by the old statute to be used pend-

ing the changeover from the stamp to the return method of collecting the tax. The defendant could not discover that from the indictment, unless he made an exhaustive analysis of the voided statute, the new statute, the latter's effective date, the old regulations and the interim new regulations. It may have been this legal tangle that misled the Department of Justice into drafting the faulty document. In any event we can hardly presume that the defendant would be more adept at solving the problem involved. Nor can we say that this indictment meets the standard of clarity required by Rule 7 (c).

The judgment of conviction is reversed. The case is remanded to the district court for further proceeding consistent with this opinion.

J. O. SMITH, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 16155.

UNITED STATES COURT OF APPEALS

Fifth Circuit

Feb. 5, 1957.

HUTCHESON, Chief Judge

Appellant was convicted on count two of an indictment charging that he and others unlawfully possessed "certain distilled spirits, to-wit: 3 gallons, the immediate containers thereof not having affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits, in violation of Section 5008, Title 26 U.S.C."

Appealing from the judgment, he is here assigning two errors. One of these is that the evidence was insufficient to support the verdict and it was error to deny his motion for acquittal. The other is that the count, while purporting to allege a violation of Sec. 5008, Title 26 U.S.C., alleged it not in the language of that section but in the language of its predecessor section 2803(a), which was repealed on January 1, 1955, when Sec. 5008(b) (1) took effect.

In support of his first specification appellant contends that, since the government agents did not testify

that he ever touched the whiskey or otherwise had it in his physical possession, their evidence: that he had told them that he usually kept good liquor; that he was temporarily out but would have plenty next week; that they went back later and made arrangements for three gallons for $24, still later went back and asked Smith about the whiskey and he said, "I'll get Gordon and let him run and get it", and several minutes later Gordon came out of the house, returning some minutes later with the whiskey; and that when they offered to pay Smith the $24, he said "No, pay Gordon"; showed no more than that he acted as agent for them and, therefore, was not sufficient to make a case of unlawful possession against him.

In support of his second contention, he points out that, while Sec. 5008(b), which he was charged with violating, denounced possession of distilled spirits "unless the immediate container thereof has affixed thereto in such manner as to be broken on opening the container, a stamp evidencing the tax or indicating compliance with the provisions of this chapter", the indictment did not so charge him, but, on the contrary, used the language of the repealed section "unless the immediate container thereof has affixed thereto a stamp denoting the quantity of the distilled spirits contained therein and evidencing payment of all internal revenue stamps imposed on said spirits." (Emphasis supplied.) So pointing, he argues that the indictment did not sufficiently charge an offense under Sec. 5008, and the judgment must therefore be reversed, and, in further support of this contention he cites and strongly relies on the opinion in *United States* v. *Smith*, 3 Cir., 232 F. 2d 570, in which the court held a similar indictment invalid.

Appellee, in reply to appellant's first contention, pointing out that the jury was fully charged on, and found the issue of, entrapment against defendant, urges upon us that the evidence furnished ample basis for a finding either that Smith was the main operator and Gordon was his agent, or that the two, as charged, were acting together in the possession and handling of the whiskey.

As to his second contention, that the indictment was invalid, appellee, insisting that the gist of the offense is not the precise manner in which the stamps are affixed or the precise manner in which they evidence compliance with the Internal Revenue laws, but the presence or absence of an official stamp indicating that the tax has been paid on the whisky contained in the particular bottle urges upon us that the Smith case was not correctly decided and should not be followed by us.

(1) We agree with appellee that the evidence was ample to support the verdict and that appellant's first specification of error is without merit, and, for the reasons hereafter stated, we agree with it that appellant's second specification of error is not well taken.

We have no fault to find, we are in full agreement with the general principles stated in *United States* v. *Smith*, 3 Cir., 232 F. 2d 570.[1] Indeed, in *Grimsley* v. *United States*, 5 Cir., 50 F. 2d 509, this court as vigorously as it could affirmed that the failure to charge the

1. These principles are fully stated and discussed in the majority and dissenting opinions in our case of Sutton v. United States, 5 Cir., 157 F. 2d 661. This case, however, involved a wholly different statute and did not, as here, involve a repealing and a repealed statute.

essential element of an offense is not and cannot be regarded as a mere technicality, and that if the indictment fails to state facts sufficient to constitute the crime charged, the judgment of conviction cannot, of course, be sustained, and this even in the absence of an attack of any kind upon the indictment in the court below.

(2) It seems clear to us, though, that here the essential element of the offense is the absence from the container of government stamps affixed thereon in some manner attesting to its legality, and not a particular kind of stamp affixed in a particular kind of way. We, therefore, disagree with the holding of the court in the Smith case, that:

> "An essential part of the present offense is the absence of the particular stamps, affixed in the specific manner described in Section 5008 (b) (1). It is not just the lack of any stamps. Even showing that the requisite stamps were on the container is not a defense, unless it is also proved that they were affixed in the prescribed manner. * * * Concededly the offense charged by Section 5008 (b) (1) is substantially different than the one stated in the repealed law." 232 F. 2d at page 573.

In vigorous support of its position that this holding is incorrect, appellee points to the fact that this is not a prosecution of a legitimate distiller for failure to have the right kind of color of tax stamps on his product or for having them wrongly placed thereon. It is a case, as are all cases brought under the statute and its predecessors in recent years, of the prosecution of

a bootlegger, an illicit whiskey distiller or seller, who has made, and makes, no pretense of being a legitimate distiller, who has paid no tax and does not intend to pay one, and who would not know how to, indeed could not if he wanted one, obtain a stamp of the kind described in Sec. 5008 (b) (1).

In further support, it points out that the form of the stamps used since the effective date of the new statute is virtually unchanged, and, though not required by the new statute, they still denote the quantity of distilled spirits contained in the vessel they are affixed to.[2]

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2. Code of Federal Regulations, Title 26, Internal Revenue, 1954, 1955 Revision, Part 230.221, provides as follows:

"230.221 Stamp Denominations. Red strip stamps will be provided in the following denominations only: 1 gallon, ½ gallon, 1 quart, ⅕ quart, ¾ quart, 1 pint, ⅕ pint, ¾ pint, ½ pint, and less than ½ pint. Red strip stamps will be issued 50 in a sheet. Requisitions for red strip stamps by proprietors of tax paid bottling houses must be made for full sheets. Stamps less than a full sheet may not be furnished by a District Director to proprietors of taxpaid bottling houses."

Part 230.203 of the same provides in part as follows:

"230.203 Liquor Bottles. Bottles must be filled as nearly as possible to conform to the amount stated on the stamp and on the label or bottle to be contained therein, but in no event may the amount of spirits contained in any bottle, due to the lack of uniformity of the bottles, vary more than 2 percent from the amount stated to be contained therein and, further, in such case there shall be substantially as many bottles overfilled as there are bottles underfilled for each lot of spirits bottled as reported on Form 230."

Taxpaid Spirits are defined in Code of Federal Regulations, Title 26, Part 230.25, as

"230.25 Taxpaid Spirits. Those alcoholic liquors on which the tax has been determined, as well as those on which the tax has actually been paid."

There was no claim in the trial of this case that there was any compliance or attempted compliance by appellant with either the old or the new statute; the non tax paid whiskey was in fruit jars, and none of those jars had any stamps.

The government evidence was not questioned or refuted by the appellant. He never contended that he had any kind of stamps on the containers or that he had paid the tax or in any way complied with the Internal Revenue laws, old or new. Under the whole evidence from both sides in this case the question is whether there was possession of whiskey in unstamped containers and not the nature and kind of non-existent tax stamps or of how they should have been affixed.

The taxes are still being paid by stamp because the Secretary of the Treasury has not as yet provided for the payment of the taxes by return. In other words the tax is being collected now in exactly the same manner as it was prior to the passage of Sec. 5008, and the red strip now being placed on the bottles of tax paid whiskey are identical with the strip stamps being placed on the bottles prior to the passage of this section. If the decision in the Smith case, that the defendant must be charged in the precise language of section 5008, is correct, it is difficult to see how he can be charged with an offense at all, for this would be to charge him with not having stamps on the containers which were not then, and are not now, in existence and which, therefore, he could not possibly have obtained.

The judgment was right. It is Affirmed.

BORAH, Circuit Judge (dissenting).

I would reverse on the authority of *United States* v. Smith, 3 Cir., 232 F. 2d 570, and, therefore, respectfully Dissent.